Chase Perdana Bhd v Pekeliling Triangle Sdn Bhd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–6 OF 2002(W)
ALAUDDIN, NIK HASHIM AND HASHIM YUSOFF FCJJ
18 SEPTEMBER 2007

Arbitration — Arbitrator — Jurisdiction — Building contract — Arbitrator conferred power under arbitration clause to substitute own discretion for that of architect — Whether courts retained power to open up, review and revise architect's certificates

Arbitration — Reference of dispute — Dispute involving third party not a party to arbitration agreement — Arbitrator not able to order relief against third party — Whether dispute ought to be referred to arbitration

Civil Procedure — Injunction — Discretion to grant — Discretionary power of the High Court — Circumstances when Court of Appeal could overrule such discretion

Contract — Building contract — Lump sum contract — Architect's certificates — Whether courts empowered to open up, review and revise certificates, opinions and decisions of architect notwithstanding delegation of such powers to arbitrator under arbitration clause

The first respondent — the registered proprietor of certain pieces of land ('the land') — contracted with the appellant to construct a certain building complex ('the project') on the land. The first respondent agreed under the contract to pay the appellant a contract sum of RM110m and a financing cost of RM12,77m. The payment was guaranteed by an irrevocable bank guarantee valued at RM122.77m to be released to the appellant upon the issuance of a certificate of practical completion' ('the CPC') by the architect. The contract also provided for disputes or differences under the contract to be referred to arbitration. The appellant completed the project and applied for the CPC. This request was denied by the architect on the grounds that work was not completed or not completed diligently. The appellant then commenced legal proceedings in the High Court and obtained several injunctions, inter alia restraining the second respondent from entering the project site and ejecting them from the site; restraining the first respondent and the architect from conspiring to terminate the appellant's employment; and compelling the architect to issue the CPC and in the event of such refusal an order authorising the SAR to issue the CPC. The respondents appealed to the Court of Appeal which allowed the appeal with costs, set aside the injunctions and the orders, and stayed the legal proceedings pending arbitration. The decision of the Court of Appeal appeared predicated upon the following findings: (a) damages were an adequate remedy as

there was the irrevocable bank guarantee; (b) there was no valid reason why the appellant was not willing to refer the dispute to arbitration; and (c) on the authority of *Northern Regional Health Authority v Derek Crouch Constructions Co Ltd* [1984] 2 All ER 175, the arbitrator had the necessary power to substitute his own discretion for that of the architect which power the High Court did not possess. The appellant was granted leave to appeal to the Federal Court on the question whether 'the courts have the power to open up, review and revise certificates, opinions and decisions of the architect when such powers have been given to the arbitrator under the arbitration clause'.

Held, allowing the appeal with costs and answering the question in the affirmative:

(1) At the time the instant appeal was heard by the Court of Appeal, *Northern Regional Health Authority v Derek Crouch Constructions Co Ltd* [1984] 2 All ER 175, had been overruled by the House of Lords in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1997] 1 AC 226. Unfortunately neither the appellant nor the first respondent had drawn the Court of Appeal's attention to this fact. The Court of Appeal would have no doubt ruled that the High Court had the necessary jurisdiction to substitute its discretion for that of the architect if its attention had been drawn to the fact that the decision in *Northern Regional Health Authority* had been overruled by *Beaufort Developments* (see paras 35 & 41).

(2) The Court of Appeal had failed to consider the fact that the arbitrator appointed to hear the dispute would not be able to order any relief against the architect. This was because the architect would not be a party to the arbitration proceedings and as such the arbitrator would not be able to order the architect to issue the CPC. The Court of Appeal was thus wrong in law to allow the first respondent's appeal to refer the disputes and differences between the appellant and the first respondent to arbitration (see paras 42 & 48); *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 followed.

(3) The decision to award an injunction is a matter of discretion for the High Court. The Court of Appeal should not overrule that discretion unless it can be shown that the High Court had incorrectly exercised its discretion. In the instant appeal, the Court of Appeal was wrong to overrule the decision of the High Court in allowing the appellant's application for the injunction. That the architect had certified almost the full contract sum emphasised the fact that the appellant had almost completed constructing the building when the first respondent sought to determine its employment. Further, the report prepared by the independent consultant was evidence of the fact that the building had in fact been completed. It was also recommended by the consultant that the CPC be issued by the architect. The unwillingness of the Court of Appeal to accept such evidence as accurate was untenable. The respondents had not put in any independent evidence to suggest that the building was not completed or that the CPC should not be issued (see paras 49, 51, 53–54).

(4) The Court of Appeal failed to realise that the bank guarantee could only be triggered if the CPC was issued by the architect. If the matter was referred to

arbitration, the arbitrator would not have the power to make any order against the architect who would not be a party to the arbitration proceedings (see para 55).

[Bahasa Malaysia summary

Responden pertama — tuanpunya berdaftar beberapa keping tanah ('tanah tersebut') — telah memasuki kontrak dengan perayu untuk membina sebuah bangunan kompleks ('projek tersebut') atas tanah tersebut. Responden pertama bersetuju di bawah kontrak untuk membayar perayu jumlah kontrak RM110j dan kos pembiayaan sebanyak RM12.77j. Pembayaran dijamin oleh gerenti bank yang tak boleh batal bernilai RM122.77j untuk diberikan kepada perayu setelah dikeluarkan sijil amalan penyiapan ('SAP') oleh arkitek. Kontrak tersebut juga memperuntukkan untuk pertikaian atau percanggahan di bawah kontrak tersebut dirujuk kepada timbangtara. Perayu telah menyiapkan projek tersebut dan memohon SAP. Permohonan ini dinafikan oleh arkitek atas alasan bahawa kerja belum siap atau tidak disiapkan dengan teliti. Perayu kemudian telah memulakan prosiding undang-undang di Mahkamah Tinggi dan memperoleh beberapa injunksi, antara lain menghalang responden kedua daripada memasuki tapak projek tersebut dan menghalau mereka daripada tapak itu; menghalang responden pertama dan arkitek daripada berkomplot untuk menamatkan pekerjaan perayu; dan mendesak arkitek mengeluarkan SAP itu dan sekiranya enggan berbuat demikian satu perintah mengarah PKP mengeluarkan SAP tersebut. Responden-responden merayu ke Mahkamah Rayuan yang telah membenarkan rayuan dengan kos, mengenepikan injunksi-injunksi dan perintah-perintah tersebut, dan menggantung prosiding undang-undang sementara menunggu timbangtara. Keputusan Mahkamah Rayuan adalah seperti penemuan berikut: (a) ganti rugi merupakan remedi yang memadai kerana terdapat gerenti bank yang tidak boleh dibatal; (b) tiada alasan sah kenapa perayu tidak sanggup merujuk pertikaian ke timbangtara; dan (c) berdasarkan autoriti *Northern Regional Health Authority v Derek Crouch Constructions Co Ltd* [1984] 2 All ER 175, penimbangtara mempunyai kuasa yang sewajarnya untuk menggantikan budi bicaranya dengan arkitek yang mana kuasa tersebut tidak dimiliki oleh Mahkamah Tinggi. Perayu telah diberikan kebenaran untuk merayu ke Mahkamah Persekutuan atas persoalan sama ada 'the courts have the power to open up, review and revise certificates, opinions and decisions of the architect when such powers have been given to the arbitrator under the arbitration clause'.

(1) Pada masa rayuan ini didengar oleh Mahkamah Rayuan, *Northern Regional Health Authority v Derek Crouch Constructions Co Ltd* [1984] 2 All ER 175, telah ditolak oleh House of Lords dalam *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1997] 1 AC 226. Malangnya perayu maupun respodnen eprtama tidak menarik perhatian Mahkamah Rayuan berhubung perkara ini. Mahkamah Rayuan sememangnya tanpa ragu akan memutuskan bahawa Mahkamah Tinggi mempunyai bidang kuasa yang sewajarnya untuk menggantikan budi bicaranya dengan arkitek jika perhatiannya ditujukan kepada hakikat bahawa keputusan dalam *Northern Regional Health Authority* telah ditolak oleh *Beaufort Developments* (lihat perenggan 35 & 41).

(2) Mahkamah Rayuan telah gagal untuk mempertimbangkan bahawa penimbangtara yang dilantik untuk mendengar pertikaian tidak boleh memerintahkan apa-apa relif terhadap arkitek itu. Ini adalah kerana arkitek itu bukan pihak kepada prosiding timbangtara dan oleh itu penimbangtara tidak dapat memerintahkan arkitek itu untuk mengeluarkan SAP tersebut. Mahkamah Rayuan oleh demikian telah terkhilaf dalam membenarkan rayuan responden pertama untuk merujuk pertikaian dan percanggahan antara perayu dan responden pertama kepada timbangtara (lihat perenggan 42 & 48); *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 diikut.

(3) Keputusan untuk mengawardkan satu injunksi adalah satu perkara untuk budi bicara Mahkamah Tinggi. Mahkamah Rayuan tidak patut menolak budi bicara itu kecuali ia boleh membuktikan bahawa Mahkamah Tinggi tidak menggunakan budi bicaranya dengan betul. Dalam rayuan ini, Mahkamah Rayuan terkhilaf apabila menolak keputusan Mahkamah Tinggi dengan membenarkan permohonan perayu untuk injunksi. Berdasarkan arkitek itu telah mengesahkan jumlah kontrak tersebut hampir sepenuhnya menekankan fakta bahawa perayu telah hampir menyiapkan pembinaan bangunan apabila responden pertama memohon untuk ditentukan pekerjaannya. Tambahan pula, laporan yang disediakan oleh konsultan bebas membuktikan hakikat yang bangunan itu sememangnya telahpun siap. Ia juga disarankan oleh konsultan tersebut agar SAP tersebut dikeluarkan oleh arkitek. Keengganan Mahkamah Rayuan menerima keterangan sedemikian sebagai tepat tidak dapat dipertahankan. Responden-responden tidak mengemukakan apa-apa keterangan berasingan untuk mencadangkan bahawa bangunan itu belum siap atau bahawa SAP tidak patut dikeluarkan (lihat perenggan 49, 51, 53–54).

(4) Mahkamah Rayuan gagal menyedari bahawa gerenti bank hanya boleh tercetus jika SAP dikeluarkan oleh arkitek. Sekiranya perkara tersebut dirujuk kepada timbangtara, penimbangtara tiada kuasa untuk membuat apa-apa perintah terhadap arkitek yang bukan merupakan satu pihak kepada prosiding timbangtara tersebut (lihat perenggan 55).]

Notes

For cases on discretion to grant injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2937–2938.

For cases on jurisdiction of arbitrator, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1257–1265.

For cases on lump sum contract, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2868–2870.

Cases referred to

Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1997] 1 AC 226 (refd)

Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd [2002] 2 MLJ 71 (folld)

Goodman v placeCityWinchester and Alton Railway plc [1984] 3 All ER594 (refd)

Northern Regional Health Authority v Derek Crouch Constructions Co Ltd [1984] 2 All ER 175 (overd)

S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62 (refd)

Legislation referred to
Arbitration Act 1952 s 6

DP Naban (Sanjay Mohanasundaran and Joyce Lim with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.
Raja Aziz Addruse (Philip Choong with him) (Philip Choong & Co) for the respondents.

Alauddin FCJ (delivering judgment of the court):

INTRODUCTION

[1] The appellant commenced legal proceedings in the High Court, Kuala Lumpur for, inter alia, the following orders:

(i) An injunction against the second respondent from entering the project site and a mandatory injunction against them to vacate the site.

(ii) An injunction against the first respondent and the architect (second defendant in the High Court proceedings) from conspiring to terminate the appellant's employment.

(iii) An injunction against the architect to issue the certificate of practical completion ('CPC') and in the event the architect refuses to do so, an independent third party be appointed to assess the works, and if the third party confirms that the building works are practically completed, the senior assistant registrar will issue a CPC.

[2] On 18 June 2001 the High Court allowed the appellant's application and dismissed the first respondent's application for a stay pending arbitration.

[3] On 22 June 2001, the Court of Appeal granted an interim stay and on 27 June 2001, the interim stay was extended. The Court of Appeal proceeded to hear the respondents' appeal and on 26 March 2002 delivered its decision, reversing the decision of the High Court.

[4] On 2 October 2002, the appellant was granted leave to appeal against the decision of the Court of Appeal on the following question:

> Whether the courts have the power to open up, review and revise certificates, opinions and decisions of the architect when such powers have been given to the arbitrator under the arbitration clause.

[5] Hence the present appeal before us.

BACKGROUND FACTS

[6] The first respondent is the proprietor of land known as Lot Nos 151, 152 and 157 Section 87A, Jalan Tun Razak, Kuala Lumpur ('the said lands').

[7] By an agreement entered into between the appellant and the first respondent on 16 March 1995 ('the contract'), the first respondent appointed the appellant as the contractor for the construction of a building comprising of commercial office and apartments proposed to be built on the said lands ('the project'). A

[8] The articles of agreement in the contract provide for disputes or differences under the contract to be referred to arbitration (see cl 34 at p 1675 Vol 3 AR). B

[9] The second defendant in the High Court action was appointed the architect for the project ('the architect').

C

[10] It was agreed between the appellant and the first respondent that the first respondent shall procure the issuance of an irrevocable bank guarantee that the appellant would be paid the contract sum of RM110,000,000 and the financing cost of RM12,770,000 (collectively referred to as 'the guaranteed sum') upon issuance of the CPC by the architect.

D

[11] Pursuant to the contract Bank Bumiputra Malaysia Berhad ("the guarantor") issued a letter dated 16 March, 1995 ('the guarantee') in favour of the appellant to pay the guaranteed sum upon the production by the appellant to the guarantor of a CPC subject however to the guarantor withholding the retention sum, which it would hold for and on behalf of the first respondent during the defects liability period (see clause 2(A) of the guarantee at pp 892 to 896 Vol 4 AR). E

[12] The appellant was to have commenced work on 30 March 1995 and completed the same within 30 months (15 September 1997). The date of completion was extended to 28 February 1998 pursuant to an application for extension of time. No further extensions of time were granted to the appellant despite numerous requests. F

[13] The appellant applied for the CPC on 22 May 2000. This request was denied by the architect on the grounds that work was not completed.

G

[14] On 29 May 2000, the architect allegedly inspected the building and issued a letter alleging that the appellant had not carried out the works regularly and diligently. The letter was followed by a notice dated 1 June 2000 from the architect. This notice was issued pursuant to cl 25 of the contract. Yet on the same date the first respondent issued invitations to its potential clients to view the building (see p 1063 AR). H

[15] On 14 June 2000, the first respondent arrived at the site with security guards who were carrying shot guns. On 19 June 2000, the solicitors for the first respondent, issued a letter to the appellant's solicitors claiming that the security guards were necessary to ensure the safety of the building. I

[16] By the conduct of the first respondent and the architect it was clear to the appellant that the first respondent had intended to terminate the contract dated

16 March 1995. By so doing there would be no obligation on the part of the architect to issue the CPC. This would mean that the appellant would not be able to issue a demand for the monies secured under the bank guarantee.

[17] It should be noted that as at 14 June 2000, the appellant had completed works valued at RM108m. The balance of the works amounts to less than 2% of the original contract sum (see p 1028 AR).

[18] In addition, it is alleged that the first respondent and the architect had colluded to prevent the appellant from receiving the CPC. On 16 May 2000, there was a meeting between the first respondent and the architect wherein the issue of the possible termination of the contract dated 16 March 1995 was discussed (see p 1038 AR).

[19] Hence the legal proceedings brought by the appellant against the respondents in the High Court.

DECISION OF THE COURT OF APPEAL

[20] The Court of Appeal allowed the respondent's appeal with costs on the ground that the injunctions should not have been ordered by the High Court as damages were an adequate remedy (see p 30 Vol 1 AR).

[21] Secondly, the Court of Appeal was of the view that there was no valid reason as to why the appellant was not willing to honour its obligations to refer the dispute to arbitration (see p 43 Vol 1 AR).

[22] Next, relying on the decision of *Northern Regional Health Authority v Derek Crouch Constructions Co Ltd* [1984] 2 All ER 175, the Court of Appeal was of the view that the arbitrator appointed to hear the dispute between the appellant and the first respondent had the necessary power to substitute his own discretion for that of the architect which power the court did not possess.

[23] At p 44 Vol 1 AR the Court of Appeal held thus:

> Further, the court has no power to open up and review the exercise of the architect's discretion since the court's discretion is limited to determining and enforcing the contractual rights of the parties and does not extend to substituting its own discretion merely because it would have reached a different conclusion since to do so would interfere with the agreement of the parties. Whereas the arbitrator, in the exercise of his power given by the contract, is entitled to modify the parties' contractual rights by substituting his own discretion for that of the architect if the arbitrator disagrees with the architect's certificates, opinions and decisions.

THE APPEAL BEFORE US

[24] In arguing the appeal before us, the first point raised by learned counsel for the appellant was the Court of Appeals' reliance on the case of *Northern Regional*

Health Authority v Derek Crouch Constructions Co Ltd [1984] 2 All ER 175. According to learned counsel at the time the appeal was heard by the Court of Appeal the said case had already been overruled by the House of Lords in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1997] 1 AC 226. A

[25] For that reason it was contended by learned counsel that the High Court had the necessary jurisdiction to subsitute its discretion with that of the architect. Accordingly, the decision of the High Court to allow the appellant's application for the senior assistance registrar to issue the CPC is correct in law. B

[26] It was further contended that the Court of Appeal failed to consider the fact that the arbitrator appointed to hear the dispute would not be able to order any relief against the architect. The architect would not be a party to the arbitration proceedings and as such the arbitrator would not be able to order the architect to issue the CPC. In support of his contention learned counsel cited the case of *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71. Accordingly it was wrong for the Court of Appeal to allow the first respondent's appeal to refer the disputes and differences between the appellant and the first respondent to arbitration. C D

[27] As the decision to order an injunction is a matter of discretion of the High Court it was submitted by learned counsel for the appellant that it was wrong for the Court of Appeal to have overruled that decision unless of course it could be illustrated that the High Court had incorrectly exercised its discretion. The case of *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 was cited in support. E

[28] In allowing the appeal against the decision to allow the injunctions sought by the appellant the Court of Appeal was of the view that damages was an adequate remedy. The Court of Appeal was also of the view that the appellant would always be able to look to the bank guarantee to secure the amounts due and owing to the appellant. However it failed to appreciate that the bank guarantee could only be triggered if the CPC was issued by the architect. Since the architect was not a party to the arbitration proceedings, the arbitrator would not have the power to make any order against the architect. F G

[29] In opposing the appeal learned counsel for the respondent submitted that it is an established principle that a party, who has agreed to refer a dispute to arbitration, is prima facie expected to honour his agreement and, in exercising its discretion under s 6 of the Arbitration Act 1952, the court will have due regard to that principle. The case of *Goodman v Winchester and Alton Railway plc* [1984] 3 All ER594 was cited in support. H

[30] That principle was the basis upon which the Court of Appeal held the High Court judge to be wrong in refusing to stay the proceedings (see pp 40–44 Vol 1 AR). I

[31] Next, learned counsel contended that the case of *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 1 All ER 175 was cited not as

A authority for the proposition that the High Court had no jurisdiction to open up and review the architect's certificates and opinions but for the principle that there was no rule of law that the arbitrator must decide all matters in dispute between the parties and that there could be no inherent objection to an action and an arbitration proceeding side by side.

B

[32] According to learned counsel for the respondent the view of the Court of Appeal that *'the court had no power to open up and review the exercise of the architect's discretion'* was not relevant to its decision to allow the respondent's appeal. Indeed the question of the finality of the architect's certificates was never in issue.

C

[33] The question posed for our determination reads as follows:

> Whether the courts have the power to open up, review and revise certificates, opinions and decisions of the architect when such powers have been given to the arbitrator under the arbitration clause.

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[34] In arriving at its decision that *'the Court has no power to open up and review the exercise of the architect's discretion since the court's jurisdiction is limited to determining and enforcing the contractual rights of the parties and does not extend to substituting its own discretion … '* it is obvious to us that the Court of Appeal heavily relied on the decision in the case of *Northern Regional Health Authority v Derek Crouch Constructions Co Ltd* [1984] 2 All ER 175 (CA) (see p 44 AR).

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[35] However, at the time this appeal was heard by the Court of Appeal the above decision had been overruled by the House of Lords in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1997] 1 AC 226. Unfortunately neither the appellant nor the respondent had drawn the Court of Appeal's attention to this fact.

F

[36] The House of Lords in *Beaufort Developments* held as follows:

> That the arbitration clause was intended to confer on the arbitrator the plenitude of powers possessed by the court to determine the rights of the parties; that it was necessary to spell out those powers in the case of the arbitrator but not in the case of the court since his powers were derived from the contract under which he was appointed, whereas the court's jurisdiction was unlimited; that, therefore, the fact that the power to open up, review and revise was expressly conferred upon the arbitrator but not upon the court could not be construed as removing the court's power, and that, accordingly in the circumstances, there would be no 'injustice to the contractors in refusing a stay.'

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[37] Lord Hoffman in his speech, appearing at p 277 of the judgment had this to say:

I

> I have said, my Lords, that *Robins v Goddard* [1905] I KB 294 is an important case. This is not because it lays down any proposition of law but because it tells us what the Court of Appeal, nearly a century ago, when the 'open up, review and revise' formula seems to have been relatively new, thought that it was intended to do. Not, as the Court of Appeal said in the Crouch case, to enable certificates otherwise conclusive to be revised by an arbitrator and no one else, but to make it clear that such certificates were not conclusive at all.

The court clearly took the view that the draftsman had seen no need to confer an express power on the court in the same terms as the arbitration clause. The court's jurisdiction was unlimited. It was the arbitrator's powers which need to be spelt out. On this view, the power to open up, review and revise falls into place alongside the other powers conferred by cl 41.4 as a power which a court would in any event possess.

[38] Continuing at p 281 his Lordship said:

In my opinion, therefore, the dicta on this point in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] QB 644 were both obiter and wrong.

[39] The speech of Lord Hope of Craighead at p 285 of the judgment reads as follows:

An arbitrator has no jurisdiction except that which the parties choose to confer upon him by their agreement to refer their disputes to an arbitrator. The whole question as to the extent of his powers rests upon the contract. So it is necessary that the agreement should set out all the powers which he is to have in order that he may determine all the matters which are in dispute. But it is not to be thought that by conferring powers on the arbitrator the parties are limiting the ordinary powers of the court to determine their rights and obligations under the contract. In the present case, for example clause 41.4 gives power to the arbitrator to rectify the contract. The court already has that power but it might well have been in doubt as to whether the power of the court could be exercised by the arbitrator. There is nothing in clause 41.4 to suggest that, by conferring this power on the arbitrator, the parties intended to remove this power from the court.

[40] And at p 292 his Lordship said thus:

For these reasons I agree with my noble and learned friend, Lord Hoffman, that the *Crouch* case was wrongly decided and should be overruled.

[41] We have no doubt that the Court of Appeal would have ruled that the High Court had the necessary jurisdiction to substitute its discretion for that of the architect if its attention had been drawn to the fact that the decision in *Northern Regional Health Authority* had been overruled by *Beaufort Developments*.

[42] The Court of Appeal had failed to consider the fact that the arbitrator appointed to hear the dispute would not be able to order any relief against the architect. This is because the architect would not be a party to the arbitration proceedings and as such the arbitrator would not be able to order the architect to issue the CPC.

[43] The same issue was dealt with in the decision of the Court of Appeal in *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71.

[44] The parties in that case had referred the dispute between them arising out of a building contract for arbitration. Subsequently, the respondent sent a notice to the appointed arbitrator that it would be applying to the High Court to revoke his

A authority on grounds that the issues it wished to raise would not be within the ambit of arbitration. The respondent then applied to the High Court which allowed the respondent to proceed with its action in court. The appellant appealed.

B **[45]** The Court of Appeal in its judgment at p 444 referred to certain English authorities and held:

> Where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court.

C **[46]** Further at p 445 the Court of Appeal held:

> Moreover, disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court (see *Turnock v Sartoris* [1889] 43 Ch D 150)

D **[47]** The Court of Appeal also referred to the case of *Beaufort Developments* and at p 446 held:

> The ousting of the arbitrator's jurisdiction is not limited to fraud alone but extends to:
>
> (a) The avoidance of multiplicity of suits;
>
> (b) The allegations connected to the subject matter which affects parties who are outside the arbitration clause;
>
> (c) All issues ought to be tried by one tribunal.

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F **[48]** Accordingly, in the present appeal we find that the Court of Appeal was wrong in law to allow the first respondent's appeal to refer the disputes and differences between the appellant and the first respondent to arbitration.

G **[49]** Next, it is trite law that the decision to award an injunction is a matter of discretion of the High Court and that the Court of Appeal should not overrule that discretion unless it can be shown that the High Court had incorrectly exercised its discretion.

H **[50]** The same issue was dealt with by the Federal Court in *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62. There the court held (at p 64):

> I We should perhaps also reiterate and stress the point that the discretion whether or not to grant an interlocutory injunction is vested in the High Court judge and not the appellate court whose function initially is one of review only, and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently: *Duport Steels Ltd v Sirs Hadmor Productions Ltd v Hamilton*; *Garden Cottage Foods Ltd v Milk Marketing Board*. These decisions of the House of Lords were referred to and applied by the English Court of Appeal in *Ninemia Maritime Corporation* [1983] 1 WLR at p 1421; [1984] 1 All ER at p 418 where Kerr LJ, in delivering the judgment of the court stated that recent

decisions of the House have emphasised the importance of appellate courts resisting the temptation to interfere with the exercise of judicial discretions other than in limited circumstances.

[51] Again, we find that the Court of Appeal was wrong to overrule the decision of the High Court in allowing the appellant's application for an injunction.

[52] The Court of Appeal was also of the view that the applications for injunction should not have been allowed as the learned judge had erred when he considered the fact that the appellant had been paid for the construction of the building and that the architect had certified the sum of RM102,428,245.83 to be the estimated value of the work done (see p 1003 AR).

[53] To our minds, the fact that the architect had certified almost the full contract sum emphasises the fact that the appellant had almost completed constructing the building when the first respondent sought to determine their employment.

[54] Further, we are also of the view that the report prepared by the independent consultant (see p 1113 Vol 4 AR) is evidence of the fact that the building had in fact been completed and it was recommended by the consultant that the CPC be issued by the architect. The unwillingness of the Court of Appeal to accept this evidence as accurate is, with respect, untenable. On the contrary, the respondents have not put in any independent evidence to suggest that the building was not completed or that the CPC should not be issued.

[55] We also agree with the submission of learned counsel for the appellant that the main reason the Court of Appeal allowed the appeal against the decision to issue the injunctions sought by the appellant was because the Court of Appeal was of the view that damages was an adequate remedy. The Court of Appeal was of the view that the appellant would always be able to rely on the bank guarantee to secure the amounts due and owing to the appellant. However the Court of Appeal failed to realise that the bank guarantee could only be triggered if the CPC was issued by the architect. If, as in this case, the matter was referred to arbitration then the arbitrator would not have the power to make any order against the architect who would not be a party to the arbitration proceedings.

[56] The Court of Appeal was also of the view that it was necessary for the arbitrator to decide on whether the CPC should have been issued or otherwise. This is apparent from its reliance on the decision in *Northern Health Authority*. However, as we have said earlier, the decision in *Beaufort Developments* clearly provides that the High Court has the necessary jurisdiction to substitute its decision for that of the architect.

CONCLUSION

[57] Based on the foregoing reasons we would therefore answer the question posed in the affirmative and allow the appeal with costs here and the courts below.

A The deposit is to be refunded to the appellant. The orders of the Court of Appeal dated 26 March 2002 are hereby set aside.

[58] My learned brothers Nik Hashim and Hashim Yusof FCJJ have seen this judgment in draft and have expressed their agreement with it.

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Appeal allowed with costs.

Reported by Andrew Christopher Simon

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